In the Supreme Court of the United States

No. 82-1071

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL., PORTLAND GENERAL ELECTRIC CO., ET AL., and PETER JOHNSON, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Ninth Circuit applied the appropriate standard of judicial review and found four contract provisions, which are unique to fourteen companies in the Pacific Northwest, to be unreasonable and unauthorized by statute, should the Supreme Court grant the Petition for Writ of Certiorari?

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RELEVANT STATUTES

Bonneville Project Act "Preference Clause":

Section 4(a). In order to insure that the facilities for the generation of electric energy at the Bonneville Project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator

shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives [16 U.S.C. § 832(a)].

Flood Control Act of 1944 "Preference Clause":

Section 5. Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles * * *. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. [16 U.S.C. § 825(5)].

Northwest Regional Act "Preference Clauses":

Section 5(a). All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7. [16 U.S.C. § 839c(a)].

Section 10(c). Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power. [16 U.S.C. § 839(c)].

Northwest Regional Act "Limitation on DSI Power":

> Section 5(d)(1)(B). After the effective date of this Act, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.' [16 U.S.C. § 839c(d)(1)(B)].

STATEMENT OF THE CASE

On August 28, 1981, the Bonneville Power Administration (BPA) executed contracts for the purchase of power with its directly served industrial customers (DSIs) pursuant to the recently enacted Pacific Northwest Electric Power Planning and Conservation Act (Northwest Regional Act). The contracts contained provisions which changed the marketing priorities of BPA for nonfirm energy sold to the DSIs and the publicly-owned preference customers of BPA.

On August 31, 1981, respondents, 12 publicly-owned utility preference customers of BPA, filed suit against BPA, seeking to invalidate numerous provisions of the DSI contracts. The publicly-owned utilities sought to prevent BPA from violating the Northwest Regional Act by allocating to the DSIs an amount of power greater than the DSIs entitlement under the Act and power to which the publicly-owned

utilities have preference. All of the privately-owned utilities in the Northwest and the Public Power Council, on behalf of the remaining 104 publicly-owned utilities in the Northwest, joined as plaintiffs.

The publicly-owned utilities narrowed their complaint by dismissing certain counts of their action because BPA compromised its position and modified provisions in its Power Sales Contracts. However, BPA refused to modify four contract provisions in the DSI contracts. The Ninth Circuit heard the action based on the publicly-owned utilities' claims that these four provisions: (1) violated express preference requirements of the Bonneville Project Act, the Flood Control Act of 1944 and the Northwest Regional Act; (2) provided the first quartile of the DSIs' load with a greater amount of power than they were entitled to under the Northwest Regional Act; and (3) violated BPA Marketing Policy Procedures by changing the priority to nonfirm energy without following required administrative procedures.

In defense, BPA claimed its authority came from two minor passages in the legislative history of the Northwest Regional Act.[1]

On April 6, 1982, a three-judge panel of Chief Judge Browning, Judge Wallace and Judge Boochever held that the contract provisions were invalid because

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[1] *See* 686 F.2d 713-714; Ninth Circuit Brief of Federal Respondents, p. 21.

they violated statutory preference. The court did not reach the other two issues.

The DSIs and BPA petitioned for rehearing and suggested a rehearing *en banc*. The panel amended its decision to reach the second issue, and held that the contract provisions were also invalid because BPA violated Section 5(d)(1)(B) of the Northwest Regional Act by providing the DSIs with a greater amount of power than they were entitled to under the Act. The Ninth Circuit then denied the petition for rehearing.

The Ninth Circuit also denied the DSIs' suggestion for rehearing *en banc* because the petitioners did not convince a single judge of the Ninth Circuit that there was any issue which warranted rehearing. The DSIs' arguments in the Petition for Writ of Certiorari are identical to their arguments for rehearing.

BPA has marketed nonfirm power in accordance with the Ninth Circuit decision from April 6, 1982 to the present, despite the Ninth Circuit's stay of its mandate pending outcome of the DSIs' petition.[2] The decision does not affect any other DSI contract provisions.

BPA did not petition this Court for certiorari.

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[2] Contrary to the parade of horribles in the DSIs' Petition and the federal respondents' Brief, BPA has suffered no adverse impact on either its system operation or its revenues from this decision. BPA understood this when it chose to market nonfirm energy as if the Ninth Circuit had not stayed its mandate.

INTRODUCTION

The Bonneville Project Act of 1937 created BPA to market power from a federal hydro-electric project on the Columbia River. The Act required, as its basic premise, that preference be given to publicly-owned utilities which were forming in the Northwest. Preference provides power generated by publicly-owned resources to the greatest number of people at the lowest possible cost and avoids the monopolization of power by industry that occurred on earlier publicly-owned projects.

Eventually BPA acquired the authority to market power from all the federally-owned dams in the Northwest. Preference controlled all firm and non-firm power BPA marketed.

However, BPA had no statutory authority to build its own generation. Therefore, as the projected demand for power began to exceel the projected supply, BPA made plans to allocate power among publicly-owned utilities and informed the DSIs that BPA could probably not renew their contracts. Congress then passed the Northwest Regional Act to resolve potential competing claims for BPA power by BPA's preference customers, to help the DSIs remain in the Northwest and to provide rate relief for the private utilities.

The Northwest Regional Act authorizes BPA to acquire resources to serve all of its customers. Based on the assumption that BPA could acquire sufficient

resources to serve the DSIs, after the preference customers are served, the Act "deems" BPA sufficient in power to offer long-term contracts to the DSIs. Nevertheless, the Northwest Regional Act requires that *all* sales under it, whether firm or nonfirm, are subject to the preference.[3]

The DSIs supported passage of the Northwest Regional because the Act authorized BPA to offer them long-term power contracts.[4]

Publicly-owned utilities supported the legislation because the Northwest Regional Act preserved their preference to supply of both firm and nonfirm energy and the Act assured that BPA could meet the utilities' future power needs. Privately-owned utilities support-

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[3] Section 5(a):

> "All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7." [16 U.S.C. § 839c(a)].

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[4] The DSIs, through their counsel in this petition, testified to Congress:

> "Under this legislation, the price of a reasonable degree of planning certainty for the DSIs is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and substantially lower power quality." Hearings on HR 3508 and 4159, before Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 311 (1979) (Testimony of Eric Redman).

ed the Northwest Regional Act because the DSIs and the publicly-owned utilities would provide rate relief for their residential and small farm customers.[5]

REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

1. THERE IS NO CONFLICT AMONG THE CIRCUITS.

As the federal respondents admit, there is no conflict among the circuits. The decision affects only the Pacific Northwest because the Northwest Regional Act applies exclusively to that region.

Congress vested exclusive and original jurisdiction for suits under the Act in the Ninth Circuit. 16 U.S.C. § 839f(e)(5). This unique design prevents conflicting decisions by the region's district courts or by courts of appeal outside the Pacific Northwest. This design provides uniformity and finality to interpretations of the Act.

Congress obviously relied on the Ninth Circuit's expertise in reviewing federal power marketing statutes. The Ninth Circuit has decided many cases involving interpretations of statutory preference and allocation of power provisions. The Ninth Circuit found that its decision follows its previous decisions

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[5] This year, BPA allocated in excess of 50 million dollars to its publicly-owned utility customers to provide rate relief for the privately-owned utilities.

involving similar preference and allocation statutes. 686 F.2d at 711, 714-715.[6]

The Petition claims a "conflict in principle" with a Sixth Circuit affirmance in *Volunteer Electric Cooperative* v. *Tennessee Valley Authority*, 13 F. Supp. 22 (E. D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir.). That case involved different facts and different law and was distinguished by the Ninth Circuit in its decision. 686 F.2d at 715. Moreover, the only conflict in principle claimed is between *Volunteer* and the Ninth Circuit's previous decision in *City of Santa Clara, Cal.* v. *Andrus*, 572 F.2d 660 (9th Cir. 1977), in which this Court denied the petition for certiorari. 439 U.S. 859 (1979).

2. THE NINTH CIRCUIT FOLLOWED THE APPROPRIATE STANDARD OF REVIEW.

The Ninth Circuit followed this Court's decisions in construing the Northwest Regional Act and BPA's interpretation of the Act. The Ninth Circuit gave "substantial deference" to BPA's statutory interpretation because BPA is the agency charged with implementing the statute and participated in its drafting. The Ninth Circuit limited its review solely to

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[6] *See, Anaheim* v. *Duncan*, 653 F.2d 1326, (9th Cir. 1981); *Anaheim* v. *Kleppe*, 590 F.2d 285 (9th Cir. 1978); *City of Santa Clara, Cal.* v. *Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co.* v. *City of Santa Clara, Cal.*, 439 U.S. 859 (1978); *Arizona Power Pooling Association* v. *Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied sub nom. Arizona Public Service Co.* v. *Arizona Power Pooling Association*, 425 U.S. 911 (1976).

whether BPA's interpretation was reasonable. The Ninth Circuit cited and followed: *United States* v. *Rutherford*, 442 U.S. 544, 553 (1979); *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Columbia Basin Land Protection Association* v. *Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981).

The Ninth Circuit, after "[g]iving all due deference to BPA's construction," found the construction unreasonable (686 F.2d at 711) and found BPA's convoluted interpretation "contravenes the longstanding preference explicitly continued under the Act and is without express statutory support" (686 F.2d at 715).

The Ninth Circuit held that provisions of the Act expressly reaffirmed the preference of publicly-owned utilities to nonfirm energy. The Ninth Circuit found that its "straightforward construction is preferable because it harmonizes what otherwise would be conflicting provisions of the Act." *See generally Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972); *Clark* v. *Uebersee Finanz-Korp*, 332 U.S. 480, 488-489 (1947). 686 F.2d at 712.

The Ninth Circuit concluded that its construction is consistent with its findings in analogous cases involving statutory construction and similar claims of exemption from preference, citing *Arizona Power Pooling Association* v. *Morton*, *supra*, and *City of*

Santa Clara, Cal. v. *Andrus, supra.* 686 F.2d at 711, 714-715.

Review by this Court would require the Court to substitute its judgment for the judgment of the Ninth Circuit. The DSIs want this Court to review the same statutory provisions and case law reviewed by the Ninth Circuit[7] and to find (1) express statutory authority for the DSIs' position where the Ninth Circuit found none, and 2) a contravention of the longstanding preference explicitly continued under the Northwest Regional Act where the Ninth Circuit found none.

3. THE DECISION DID NOT AFFECT THE DSIS ECONOMICALLY NOR DID IT AFFECT BPA REVENUES.

The DSIs and the federal respondents allege a list of potential horribles resulting from the decision. All of them are incorrect and alleged solely to alarm this Court.

The decision maintains the amount of power sold to the DSIs and the amount of revenue BPA derives from such sales. The Northwest Regional Act continues service to the DSIs first quartile in four ways: (1) BPA purchases pursuant to § 9(i)(1) of the

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[7] In order for the DSIs to prevail on the challenged contract provisions, this Court would not only have to reverse the Ninth Circuit on both of the issues, but the Ninth Circuit would then have to determine whether BPA failed to follow required procedures in adopting the contract provisions. 686 F.2d at 715.

Northwest Regional Act; (2) DSI direct purchases; (3) shifting of water in the reservoirs; and (4) nonfirm energy. BPA serves the first quartile with nonfirm energy only during a portion of the year. If nonfirm is not available, the first quartile is served by one of the other three methods. After the decision, the DSIs receive an amount of power equivalent to that which they received before the Act.

The DSIs and the federal respondents allege that the decision may cause industries to leave the Region and that one has left already.[8] The world aluminum market is severly depressed. Market conditions, not changes in priority to nonfirm energy, have caused the DSIs to operate at fifty percent or less of their capacity.[9] The Ninth Circuit decision has not increased by even one cent, the cost of producing aluminum in the Pacific Northwest.

The federal respondents and the DSIs allege that the Ninth Circuit decision may cause BPA to suffer a revenue shortfall because anticipated revenues will not be recovered from the DSIs. In recovering costs for first quartile service BPA bases its rates on expected average service to the first quartile. The

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[8] The only industry that closed was not even operating *prior* to the Northwest Regional Act but was receiving power only for security and plant maintenance.

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[9] Presently, BPA has an enormous surplus of hydroelectric power and is spilling water without generating electricity. The DSIs are not purchasing this inexpensive power.

Ninth Circuit's decision does not affect this average service, and therefore, will not affect BPA's recovery of anticipated revenues.

The federal respondents allege that BPA may have to build additional generation. That is not correct. BPA is prohibited from building generation to serve the interruptible first quartile of the DSIs. See Ninth Circuit Brief of Federal Respondents, p. 24, lines 10-12; Ninth Circuit DSI Brief, p. 25.

More importantly, the Ninth Circuit decision ensures that, in a low water year, cities like Eugene and Seattle will have access to power when a generation plant breaks down or their utility's load peaks above BPAs' firm power reserves instead of facing potential blackouts.

4. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY

The DSIs and federal respondents repeat the arguments they made to the Ninth Circuit and ask this Court to substitute its judgment for the judgment of the Ninth Circuit. They argue that:

(1) The definition of reserves in the Northwest Regional Act [§ 3(17)] coupled with the requirement that sales of power to the DSIs provide reserves for the firm loads of BPA [§ 5(d)(1)(A)], require that the DSIs' first quartile loads of approximately 1,000 megawatts be served with nonfirm energy ahead of

the approximately 25 megawatts of nonfirm energy purchased annually by the preference customers.

The Ninth Circuit held that the fact that the DSIs provide reserves does not create an entitlement to an allocation of power ahead of the preference customers. "It is a non sequitur to conclude from the fact that the reserve cannot be used for non firm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference."[10] 686 F.2d at 712.

(2) Two provisions in the legislative history support their argument on nonfirm energy priorities.

The Ninth Circuit held that the legislative history is ambiguous.[11] The two provisions cited are not clearly instructive on the issues involved in the case. 686 F.2d at 713-714.

(3) Although the Northwest Regional Act provides that the DSIs are entitled to only an amount of power equivalent to their entitlement under their 1975 con-

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[10] Although not addressed by the Ninth Circuit, it was also undisputed that the nature of reserves provided by sales to the DSIs for their first quartile loads was *exactly the same* before the Northwest Regional Act as expressed in the Act. Compare § 3(17) of the Act to the BPA Final Role Environmental Impact Statement, Sec. III, p. 80 (1980).

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[11] For example, there are numerous passages in the legislative history which support the preference requirement and contradict the DSI and federal respondents' arguments. *See* Appendix A.

tracts [§ 5(d)(1)(B)], a priority to nonfirm energy for the DSIs is not an increase in the amount of power but merely an improvement of "quality."

The Ninth Circuit held that the DSIs' entitlement to power is restricted by the Northwest Regional Act to their entitlements under their 1975 contracts. Since under their 1975 contracts the DSIs received nonfirm energy after the preference customers, an increase in priority for the DSIs would be an entitlement to a greater amount of power than allowed under the Northwest Regional Act. 686 F.2d at 712.

(4) The Northwest Regional Act created an exception to the preference of publicly-owned utilities to nonfirm energy for service to the DSIs' first quartile loads.

The Ninth Circuit held that Congress provided an explicit mandate for preference in the Northwest Regional Act. There is no express or implied indication in the Act that Congress intended to create an exception to override this mandate. 686 F.2d at 711-713.

CONCLUSION

The Ninth Circuit applied the appropriate standard for review and concluded that the four contract provisions are unauthorized by statute and unreasonable. The decision does not conflict with the decision of another Court of Appeals and does not call for an exercise of this Court's power of supervision. The decision affects only the contract provisions in question. The Petition should be denied.

Respectfully submitted,

By:.....

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APPENDIX A

In the legislative history of the Northwest Regional Act, Congress repeatedly and unambiguously emphasized its reaffirmation of preference.

The House Committee of Interior and Insular Affairs states in its report:

> "It is not, however, a purpose of this legislation to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region." H. R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. p. 26.

> "Sections 5 of S. 885 also contains provisions designed to insure that preference customers of BPA continue to have supply preference to the amount of resources to which the preference clause applies. The most significant of these is Section 5(a) which provides that all power sales by BPA pursuant to this legislation 'shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937.' * * * and, in particular, sections 4 and 5 thereof." * * * Taken together, these and other provisions of section 5 will make certain that all preference customer contract requirements will continue to have a priority over BPA sales to other customers." *Id.*, p. 34.

> "Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly sections 4 and 5 of the Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales." *Id.*, p. 46.

"Section 10(c) expressly preserves the provisions of Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of Federally generated electric power." *Id.*, p. 57.

The House Committee on Interstate and Foreign Commerce states in its Report:

"In marketing power generated at these Federal hydro projects, Congress provided that BPA is unequivocally obliged by statute to 'give preference and priority to public bodies and cooperatives' which terms are defined in section 3 of the Bonneville Project Act. Such public bodies and cooperatives are known as 'preference customers'. S. 885, as amended by this Committee, does not alter in any way that Congressionally-established obligation and priority, not [*sic*] does the Committee intend that the legislation be construed to alter or modify that obligation and priority." H. R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. p. 24.

"It [S. 885, as amended by the Committee] fully preserves the preference clause and the long-held statutory rights of preference customers." *Id.*, p. 27.

"a. *Protection of the preference clause.*

"Preference means the statutory priority to purchase Federally-generated electricity which has generally been provided to public bodies and rural electric cooperatives in over 32 Federal power marketing laws. These preference provisions date back to 1902 and were enacted to in-

sure that Federal hydroelectric generating facilities would be operated for the benefit of the general public. * * *.

"Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price." *Id.*, pp. 33-34. (Emphasis in original.)

"Lastly, section 10(c) of the bill contains a disclaimer which flatly states that the bill does not 'alter, diminish, abridge, or otherwise affect,' either directly or indirectly, the preference provisions of other Federal laws. The Committee clearly intends no such construction of this Act by a court, Federal agency, or others that could affect in any way such provisions of law.

"The Committee believes that these and other safeguards adequately protect the preference clause and the long-held rights of preference customers in the Pacific Northwest and elsewhere." *Id.*, pp. 34-35.

"Section 5(a) makes clear that all power sales, including exchange sales, under this bill are subject at all times to the preference provisions of the Bonneville Project Act, as discussed earlier

in this report. These provisions retain and assure preference and priority in BPA power sales to public bodies and cooperatives. *Id.*, p. 59.

The Senate Report states:

"The preamble to section 5 is one of several savings provisions which appear in the bill to preserve the 'preference clause' of the Bonneville Project Act. The Committee is aware of no inconsistency between the provisions and intent of this Act and the existing preference clause of the Bonneville Project Act." S. Rep. No. 96-272, 96th Cong. 1st Sess. p. 26.

"*Section 10(d).* — This section preserves the provisions of other Federal power marketing statutes by which public bodies and cooperatives are accorded preference and priority in the sale of power generated at federally-owned projects." *Id.*, p. 35.

As one example from the many statements made by congressmen concerning preference and the intent of the Act, Representative Swift, speaking in support of the bill that became the Act, said:

"Eighth. The bill does not violate the preference clause: The bill has been heavily amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association and the American Public Power Association are in full agreement that the bill in its present form protects preference. And contrary to what some critics have alleged, the

bill does not enlarge the class of preference customers to include investor-owned utilities or the consumers served by IOU's; neither the power supplies nor the power costs of the IOU's or their customers are protected in the manner provided for preference customers." 126 Cong. Rec. H. 9851 (daily ed. September 29, 1980).